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# Legally Speaking -- Creating a Level Playing Field in the WIPO

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# LEGAL ISSUES



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## Legally Speaking — Creating a Level Playing Field in the WIPO

### The Chilean Proposal to Standardize Library Copyright Exceptions Worldwide

by **Bryan M. Carson, J.D., M.I.L.S.** (Associate Professor, Coordinator of Reference and Instructional Services, Associated Faculty — Library Media Education Program, Western Kentucky University Libraries, 1906 College Heights Blvd. #11067, Bowling Green, Kentucky 42101-1067; Phone: 270-745-5007; Fax: 270-745-2275) <bryan.carson@wku.edu>

On October 28, 2004, the Chilean government made one of the most sweeping proposals for international copyright protection in years. The proposal was simple, taking up only three sentences. The writing was in a stilted diplomatic style, where more room is spent sending respects than making proposals, and one sentence was a run-on. Yet these three simple sentences may have more impact on the international harmonization of copyright law than anything else since the United States ratified the **Berne Convention** in 1988.<sup>1</sup> This simple yet revolutionary proposal reads as follows:

The Permanent Mission of Chile to the **World Trade Organization** presents its compliments to the **World Intellectual Property Organization** and has the honor to request, on behalf of the Government of Chile, the inclusion for the Twelfth Session of the Standing Committee on Copyright and Related Rights of the subject of exceptions and limitations to copyright and related rights for the purposes of education, libraries and disabled persons, in the current agenda item referring to "other issues for review," which would become agenda item 4. The current item 4 referring to the protection of broadcasting organizations would therefore become agenda item 5.

The Permanent Mission of Chile to the **World Trade Organization** reiterates to the **World Intellectual Property Organization** the assurances of its highest consideration.<sup>2</sup>

The reason why this proposal is so important is because current copyright treaties do not make any provisions for library or educational uses. As I have discussed in previous columns,<sup>3</sup> the U.S. has a number of exclusions to copyright law for libraries and archives. These exceptions are found in section 108 of the Copyright Act.<sup>4</sup> There are also exceptions to the copyright law for face-to-face and distance education,<sup>5</sup> as well as for distribution to people who are blind or physically handicapped.<sup>6</sup> A few other countries, including Canada, Chile, and Australia, also have similar copyright exceptions. However, many countries don't have

these provisions, and even among countries that have copyright exceptions the language is far from universal. As a result, publishers are left in the dark just as much as copyright users are, since the rules do not create a level playing field.

On November 21 - 23, 2005, the **World Intellectual Property Organization (WIPO)** Standing Committee on Copyright and Related Rights held its Thirteenth Session in Geneva. The Chilean proposal is not a full-fledged document; rather it is a proposal to negotiate a uniform exception within the **WIPO** framework. As a result, the 13th Session began with an "Information Meeting on Educational Content and Copyright in the Digital Age." The day-long session included representatives from publishers, educators, and libraries.<sup>7</sup> I wish I could have been there to participate in this discussion. However, luckily for us, transcriptions of the talks have been placed in the public domain, and are freely available online.<sup>8</sup> These notes illustrate the issues that need to be discussed and the challenges that are faced by publishers, authors, libraries, and educators in the world marketplace of ideas.

It has always been difficult to balance the legitimate needs of copyright holders with the legitimate needs of copyright users. The **WIPO** meeting illustrated this difficulty. The CEO of **Literamed Publishing** in Nigeria, **Otunba Olayinka M Lawal-Solarin**, reminded the attendees that many multinational publishers don't do a good job of publishing authors from the developing world. As a result, indigenous publishers are needed "to develop the appropriate type of cultural goods for Africa."<sup>9</sup> **Mr. Otunba** explained that in fact stronger copyright laws are needed in order to produce indigenous works, since:

Publishing is NOT every man's meat. It's not like buying rice or selling computers. It's arduous work. It has taken me 35 years to make a viable publishing company. Collecting societies are there to collect SMALL royalties to be

distributed to publishers . . . There are laws to protect everyone. If you're going to copy 100 articles, you should pay for it. Someone is suffering because of that.<sup>10</sup>

On the other hand, **Teresa Hackett**, a representative of the **International Federation of Library Associations (IFLA)**, reminded the audience: "[C]opyright is not just about the rights of creators. What makes copyright work is the exceptions and limitations. Copyright is supposed to balance the users' right to access and use knowledge. International agreements guarantee the same rights to creators, but not the exceptions to monopoly rights." According to **Ms. Hackett**, what is needed is a "[b]alance between the rights of authors and rights of publishers. If exceptions are narrow, how can there be a balance? Without a balance, copyright works against libraries, against educators, against access for people with disabilities and against development."<sup>11</sup>

The stakes are very high for all parties, but **Sonny Leong**, the Executive Chairman of **Cavendish Publishing** in London, reminded the conference attendees of why negotiation is necessary:

Recently I was in a South American country; I had a meeting with several people at the university as well as many students. It embarrassed me to meet these students knowing my government took away the books these students could have bought. They're capable and could have gone to overseas universities, but because of their economic circumstances they have to study at home. Their library is full of 20-year-old books. These students were deprived of the books they could easily have afforded to buy.<sup>12</sup>

The real problem is that the laws of each nation are so different that publishers are rightly afraid of piracy, while educators and librarians are concerned about the lack of knowledge resources in the developing world. Because of copyright and piracy concerns, it is very difficult

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cult to obtain licensing in many countries. For example, **Otunba Olayinka M Lawal-Sola** related a problem he had trying to buy rights to a series of Bible stories in Germany. According to **Mr. Otunba**, "We have to get a reference because we're African, because they don't trust African copyright laws. I needed a reference. I had to go to a friend in Norway to give me a reference in order to get the rights to buy." Further harmonization of international copyright law would help to eliminate this hurdle for the developing world.

The Chilean proposal includes the following provisions:


- Preservation and restoration of works — "photocopying without prior authorization is legitimate if it is to replace a book that has been lost or damaged or to acquire a copy for a library if it has been unavailable in the market for a five-year period."<sup>13</sup>
- Libraries would be allowed to copy up to two chapters for non-commercial private use.
- Libraries and archives would be allowed to digitize work that is in its physical collection as long as the copy does not leave the building and provided that patrons are not charged to use the materials.
- Academic and school libraries would be allowed "to reproduce short articles from periodicals or partial works for the use of the students of the institution in response to the requests from the teachers of a given course, provided that the [copyright holders'] interests are upheld."<sup>14</sup>
- Libraries would be allowed "to adapt works or reproduce works in assistive formats, especially for the visually impaired. There might or might not be remuneration depending on national legislation."<sup>15</sup>

Although opinions differ on the scope of copyright exceptions, it is my opinion that standardization of the international copyright system will benefit everyone. After all, "[P]irates copy popular works, but these subsidize the publication of poetry and other culturally important items."<sup>16</sup> The idea of a level playing field is that everyone knows the rules, and the rules are the same for everyone. Just as the **TEACH Act** was a negotiated agreement between copyright owners and copyright users, between librarians and publishers, and between educators and film studios, so too should the **World Intellectual Property Organization** bring all the stakeholders together to create agreement. As important as the **TEACH Act** was for education in the U.S., it is far more critical for those in the developing world. At the same time, publishers need to be assured of the means to continue publishing.

For this article, I have relied mainly on the talks given in Geneva. However, this is a difficult issue on which reasonable people may differ. For my next article, I will discuss this issue from the perspective of the publishing industry. I would like to hear from those of you in the publishing world. Please contact me with comments that I can use for the next issue. I would like to know whether you are in favor of negotiating a **WIPO** treaty on copyright exemptions or whether you are opposed. Please tell me your rationale, and what provisions you would like to see included or excluded from a treaty on copyright exemptions. You may email me at <bryan.carson@wku.edu>, or you could schedule an appointment with me at **ALA Mid-Winter** by calling my cellphone at 270-991-7144. Please indicate whether you wish

your comments to include your name or whether you wish them to be anonymous.

The Chilean proposal has both good and bad points. But, most important of all, it is a start. Negotiations have to start somewhere, and the Chilean government has brought up some very important issues that we can all negotiate so that everyone wins. A statement **Sonny Leong** made at the conference best sums up what is at stake:

I have spent the last 10 years visiting countries where there is limited access to affordable books. We need to talk about copyright and exceptions to the rule. . . . Don't take away intellectual property wholesale. Piracy will be the end of publishing. Together we can make ignorance history. 

### Endnotes

1. 17 U.S.C. § 101. See, U.S. Copyright Office, Circular 38a: International Copyright Relations of the United States (January 2003), available at <http://www.copyright.gov/circs/circ38a.html>. See also, U.S. Copyright Office, *Appendix II: Berne Convention Implementation Act of 1988*, Circular 92: Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code (last accessed September 11, 2005), available at <http://www.copyright.gov/title17/92appii.html>.
2. Permanent Mission of Chile in Geneva to the World Trade Organization, *Proposal on exceptions and limitations to copyright and related rights*, translated by the WIPO Secretariat (October 28, 2004); available at [http://www.ompi.int/edocs/mdocs/copyright/en/ccr\\_12/ccr\\_12\\_3.doc](http://www.ompi.int/edocs/mdocs/copyright/en/ccr_12/ccr_12_3.doc).
3. For example, see the following "Legally Speaking" columns: *What is Intellectual Property?*, 12-2 *Against the Grain* 52 (April 2000); *Fair Use and the Common Law of Copyrights*, 14-1 *Against the Grain* 60 (February 2002).
4. 17 U.S.C. § 108.
5. 17 U.S.C. § 110(1). For more information, see the following "Legally Speaking" columns: *Copyright and Distance Education*, 13-4 *Against the Grain* 68 (Sept. 2001); *TEACHing Online: An Update on the TEACH Act*, 15-5 *Against the Grain* 34 (November 2003).
6. See, 17 U.S.C. § 110(9).
7. World Intellectual Property Organization, *Informational Meeting on Educational Content and Copyright in the Digital Age Draft Program*, Geneva (November 21, 2005), available at [http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=9462](http://www.wipo.int/meetings/en/details.jsp?meeting_id=9462).
8. Cory Doctorow, Thuru Balasubramaniam, Rufus Pollock and Eddan Katz, Notes of the World Intellectual Property Organization's Informational Meeting on Educational Content and Copyright in the Digital Age (November 23, 2005), available at <http://www.eff.org/deeplinks/archives/004193.php>. [NOTE: all future citations to the conference are from this transcript.]
9. "Copyright and Education: A Publisher's Perspective from the Developing World," Address of Otunba Olayinka M. Lawal-Solarin to *Informational Meeting on Educational Content and Copyright in the Digital Age Draft Program*, Geneva (November 21, 2005), available at <http://www.eff.org/deeplinks/archives/004193.php>.
10. *id.*
11. "Learning with Libraries and Copyright Issues," address of Teresa Hackett to *Informational Meeting on Educational Content and Copyright in the Digital Age Draft Program*, Geneva (November 21, 2005), available at <http://www.eff.org/deeplinks/archives/004193.php>.
12. Facilitating the flow of educational materials in developing countries: Commercial licensing systems," Address of Sonny Leong to *Informational Meeting on Educational Content and Copyright in the Digital Age Draft Program*, Geneva (November 21, 2005), available at <http://www.eff.org/deeplinks/archives/004193.php>.
13. "Devising copyright exceptions for education: national experience of Chile and Canada," Address of Luis Villarroel Villalón to *Informational Meeting on Educational Content and Copyright in the Digital Age Draft Program*, Geneva (November 21, 2005), available at <http://www.eff.org/deeplinks/archives/004193.php>.
14. *id.*
15. *id.*
16. "Facilitating the flow of educational materials in developing countries: Commercial licensing systems," Address of Victoriano Colodrón to *Informational Meeting on Educational Content and Copyright in the Digital Age Draft Program*, Geneva (November 21, 2005), available at <http://www.eff.org/deeplinks/archives/004193.php>.